

*a***THE PACIFIC BANK BHD****v.****VIMLA TEXTILES & ORS***b*

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22-4413-1998]
10 MAY 2004

c

CIVIL PROCEDURE: *Judgment - Default of defence - Setting aside - Whether there was a contumacious delay - Whether reasons for delay untenable - Whether contract between relevant parties one of guarantee or indemnity - Whether leave of court required to commence action against 2nd and 3rd defendants - Whether judgment obtained in a regular fashion*

d

This was an appeal by the 2nd and 3rd defendants against the senior assistant registrar's decision dismissing their application to set aside a judgment in default of defence entered against them in relation to the plaintiff's attempts to recover monies in arrears under certain credit facilities granted by the plaintiff to the 1st defendant based on the terms and conditions of a letter of offer. The 2nd and 3rd defendants, who were partners trading in the name and style of the 1st defendant, had jointly and irrevocably agreed and undertaken *vide* an indemnity agreement to indemnify the plaintiff for all the claims and liabilities arising from the failure of the 1st defendant to comply with the terms of the letter of offer. The High Court had earlier appointed two persons as the receivers and managers of the business of the 1st, 2nd and 3rd defendants.

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The main issue requiring determination was whether the judgment ought to be set aside or varied by this court.

Held (dismissing the appeal):*g*

[1] There was a contumacious delay of up to 16 months on the part of the 2nd and 3rd defendants in filing the application to set aside the judgment. The reasons advanced for the delay, *ie*, financial constraints and the appointment of the receivers and managers to take charge of the business of the 1st and 2nd defendants, were certainly untenable in the circumstances. Since there was an utter lack of candour on the part of the 2nd and 3rd defendants, the preliminary issue on the delay should be decided in favour of the plaintiff. (pp 418 h, 419 e & 421 f)

*h**i*

- [2] The contract between the borrower, the indemnifier and the bank was intended by the parties to be a contract of indemnity and not a contract of guarantee. At any rate, there was no barrier for the 2nd and 3rd defendants to undertake an additional obligation to pay money that they were already bound to pay as partners and borrowers. (p 427 e & h) a
- [3] Leave of the court was not required to commence an action against the 2nd and 3rd defendants as individuals and in their personal capacity because the plaintiff's right of indemnity against or from the personal assets of the 2nd and 3rd defendants could not be said nor deemed to be an interference of the assets within the control of the appointed receivers and managers. (p 434 c-d) b
- [4] Taken cumulatively together, all the facts in the present case showed that the judgment was obtained in a regular fashion. There was no ambiguity in the said judgment in regard to the principal sum and the interest that were levied for both the overdraft and banker's acceptance facilities which the 2nd and 3rd defendants were obliged to pay the plaintiff. The 2nd and 3rd defendants also did not request an ascertainment of the interest payable. That being the case, the principle of law in regard to the default judgment enunciated in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* was inapplicable to the facts of the present case since the 2nd and 3rd defendants were not at all perplexed as to the total sum to pay under the default judgment. (p 436 c-f) c

Case(s) referred to:

- Adzmi Ali & Anor v. Mohamed Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC (*refd*) d
- Atwood v. Chichester* [1878] 2 QBD 722 (*refd*) e
- Ban Huat Seng Co Ltd v. Lee Poh Soo* [1967] 1 MLJ 145 (*refd*) f
- Beale v. Macgregor* [1886] 2 TLR 311 (*refd*)
- Bissill v. Bradford Tramways Co* [1891] WN 51 (*refd*)
- BP Malaysia Sdn Bhd v. Low Nam Hui Co Ltd* [1970] 2 MLJ 78 (*refd*)
- Budgett v. Improved Patent Forced Draught Furnace Syndicate Ltd* [1901] WN 23 g
- Burchmore v. Hills* [1935] 79 LJ 30 (*refd*)
- Burns v. Kondel* [1971] 1 Lloyd's Rep 554 (*refd*)
- Chong Kueng Ying & Ors v. Lovis Lavagna* [1971] 2 MLJ 225 (*refd*)
- Clipper Maritime Ltd v. Shirlstar Container Transport Ltd* [1987] 1 Lloyd's Rep 546 (*refd*)
- Crown Lumber Co Ltd v. Engel* [1961] 28 DLR (2d) 762 (*refd*) h
- Davis v. Ballenden* [1882] 46 LT 797 (*refd*)
- Davys v. Buswell* [1913] 2 KB 47 (*refd*)
- Development & Commercial Bank Ltd v. Cheah Theam Swee* [1989] 2 MLJ 496 (*refd*) i

- a** *Edwards v. Standard Rolling Stock Syndicate* [1893] 1 Ch 574 (**refd**)
Evans v. Bartlam [1937] 2 All ER 646 (**refd**)
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC (**refd**)
Government of Malaysia v. Sim Soe Hoe [1990] 1 MLJ 379 (**refd**)
Goulston Discount Ltd v. Clark [1967] 2 QB 493 (**refd**)
- b** *Grigson v. Taplin & Co* [1915] 85 LJ Ch 75 (**refd**)
Harburg India Rubber Com Co v. Martin [1902] 1 KB 778 (**refd**)
Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 SC (**refd**)
Hong Leong Finance Bhd v. Thamilchelevan Palinesamy & Anor [1996] 1 CLJ 471 (**refd**)
- c** *Hopkins v. Worcester and Birmingham Canal Proprietors* [1868] LR 6 Eq 437 (**refd**)
Hubbuck v. Helms [1887] 56 LJ Ch 536 (**refd**)
IAC (Singapore) Pte Ltd v. Koh Meng Wan [1979] 2 MLJ 9 (**refd**)
Jacques v. Harrison [1883] 12 QBD 165 (**refd**)
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA (**refd**)
- d** *Leong Han v. Kupusamy* [1959] 25 MLJ 95 (**refd**)
Ling Sing Hung & Ors v. Kontiki Trading Pte Ltd [1998] 4 CLJ 345 CA (**refd**)
Malayan Banking Bhd & Anor v. Swasta Jaya Sdn Bhd [1990] 1 CLJ 1096; [1990] 1 CLJ (Rep) 166 SC (**refd**)
Malayan Banking Bhd v. Yeo Sun Tong [1999] 4 CLJ 425 HC (**refd**)
Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 HC (**refd**)
- e** *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (**refd**)
Matang Holdings Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 2 MLJ 406 (**refd**)
McMahon v. Northe Kent Ironworks Co [1891] 2 Ch 148 (**refd**)
Moss Steamship Co Ltd v. Whinney [1912] AC 254 (**refd**)
- f** *NW Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 425 (**refd**)
Philipps v. Philipps [1878] 4 QBD 139 (**refd**)
Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 HC (**refd**)
Re Borax Co, Foster v. Borax Co [1901] 1 Ch 326 (**refd**)
- g** *Re Carshalton Park Estate Ltd, Graham v. Carshalton Park Estate Ltd, Turnell v. Carshalton Park Estate Ltd* [1908] 2 Ch 62 (**refd**)
Re Church Press Ltd [1917] 116 LT 247 (**refd**)
Re London Pressed Hinge Co Ltd, Campbell v. London Pressed Hinge Co Ltd [1905] 1 Ch 576 (**refd**)
Re New York Taxicab Co, Sequin v. New York Taxicab Co Ltd [1913] 1 Ch 1 (**refd**)
- h** *Re Rosenthal, ex p Mark* [1910] 54 Sol J 751 (**refd**)
Re Tilt Cove Copper Co Ltd [1913] 2 Ch 588 (**refd**)
Re Victoria Steamboats Ltd [1897] 1 Ch 158 (**refd**)
Saripah Manap & Ors v. Emar Sdn Bhd & Ors [1997] 4 CLJ 194 HC (**refd**)
Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng [1947] MLJ 174 (**refd**)
- i**

Sime Bank Bhd v. Lal Bhojraj Khanchandani & Ors [1999] 6 CLJ 168 HC (**dist**) **a**
Thompson v. Palmer [1933] 49 CLR 507 (**refd**)
Thorn v. Nine Reefs Ltd [1892] 67 LT 93 (**refd**)
Total Oil Products (Aust) Pty Ltd v. Robinson [1970] 1 NSW 701 (**refd**)
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241
FC (**dist**)
United Malayan Banking Corp Bhd v. Tan Kay Hock [1997] 4 CLJ 717 CA (**refd**) **b**
*United Malayan Banking Corporation Bhd v. Official Receiver & Liquidator of Soon
Hup Seng Sdn Bhd & Anor* [1986] 1 MLJ 75 (**refd**)
VVDN Sockalingam Chettiar & Ors v. KRPRSM Somasundaram Chettiar [1941] MLJ
103 (**refd**)
Western Credit Ltd v. Alberry [1964] 2 All ER 938 (**refd**) **c**
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 (**refd**)

Legislation referred to:

Contracts Act 1950, s. 77
Rules of the High Court 1980, O. 13 r. 8, O. 14 r. 11, O. 19 r. 9, O. 35 r. 2(1),
O. 42 r. 13, O. 70 rr. 18, 20, O. 81 r. 7 **d**

Other source(s) referred to:

Kerr on Receivers, 11th edn, para 6

For the plaintiff - Wang Kuo Shing; M/s Wang Kuo Shing & Co
*For the 2nd & 3rd defendants - Devahi Rosalind John; M/s Atma Singh Veriah &
Co* **e**

*[The 2nd and 3rd defendants have appealed to the Court of Appeal vide Civil Appeal
No: W-02-998-03]*

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

The appeal in encl. 24 concerned only the second and the third defendants. The first defendant appeared to be happy with the judgment under O. 14 of the Rules of the High Court 1980 (“RHC”) that was entered against the Receivers and Managers for the first defendant on 23 June 1999. **g**

Receivers and Managers featured prominently in this case. They must act with reasonable care and diligence. They too must act in good faith in the best interests of the company and for a proper purpose. They must avoid making improper use of their position by wrongly using the information which they receive in the course of their duty. Foremost, they must act within the confines of the law. They certainly have the power to manage the business with a view to the eventual disposal of the assets as a going concern (*Re Victoria Steamboats Ltd* [1897] 1 Ch 158). **h**

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- a* This judgment centred on encl. 24. Related issues pertaining to encl. 24 would be ventilated in this judgment. All these related issues were certainly interesting and they will be highlighted and emphasised accordingly.

In the meantime, I must set out the chronology of events pertaining to the case at hand and I shall do so forthwith.

b

Chronology Of Events

- c* **(a) 19 December 1997:** Two individuals in the persons of Kenneth Teh Ah Kiam and Chew Hoy Ping were appointed as the Receivers and Managers on the business of the first defendant, the second defendant and the third defendant with all the necessary powers provided for in accordance with the order of the Kuala Lumpur High Court under code no: D2-22-1303-97.

- d* **(b) 13 July 1998:** And by way of a court order *vide* the Kuala Lumpur High Court Sivil Suit No: D2-22-1303-97, the plaintiff was given the liberty to commence action including execution against Kenneth Teh Ah Kiam and Chew Hoy Ping acting as Receivers and Managers on the business of the second and the third defendants together with the first defendant by the name of Vimla Textiles in order to recover monies in arrears under the credit facilities given by the plaintiff to the first defendant.

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- (c) 13 August 1998:** The plaintiff filed the writ and the statement of claim against:

- f* (i) the first defendant where the action was based on a letter of offer dated 1 June 1995 and the letter of set-off dated 12 July 1995 together with the memorandum of deposit dated 21 June 1995; and also against
- (ii) the second and the third defendants where the action was based on their respective personal capacity and relying on the document entitled "Indemnity by Partners" dated 21 June 1995.

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- (d) 22 December 1998:** The service of the writ dated 30 November 1998 and the statement of claim were effected on the solicitors of the Receivers and Managers for the first defendant.

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- (e) 28 December 1998:** The solicitors for the Receivers and Managers of the first defendant entered an appearance.

- (f) 12 January 1999:** The first defendant filed its statement of defence.

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- (g) **30 March 1999:** The plaintiff amended its statement of claim to reflect that the actual interest rate for the facilities of overdraft and bankers' acceptance as charged by the plaintiff. The interest rates were reduced from 4% per annum plus the Base Lending Rate ("BLR") to 2.5% per annum plus BLR with effect from 1 October 1998 in accordance with the directive as reflected in the letter dated 15 September 1998 from Bank Negara Malaysia – the Central Bank of Malaysia. a
- (h) **20 April 1999:** The amended statement of claim were served on the solicitors of the Receivers and Managers for the first defendant, and on the second and the third defendants' solicitors. b
- (i) **26 April 1999:** The second and the third defendants entered appearance. c
- (j) **23 June 1999:** Judgment under O. 14 of the RHC was entered against the Receivers and Managers for the first defendant.
- (k) **24 June 1999:** Judgment in default of defence was entered against the second and the third defendants. d
- (l) **16 September 1999:** The judgment in default of defence was served on the solicitors for the second and the third defendants.
- (m) **1 March 2000:** Service of the bankruptcy notice dated 5 January 2000 on the third defendant by way of personal service. e
- (n) **10 October 2000:** Service of the creditor's petition dated 26 May 2000 on the third defendant by way of personal service.
- (o) **18 January 2001:** The second and the third defendants' application by way of summons in chambers as per encl. 17 to set aside the judgment in default of defence was filed. f
- (p) **20 June 2001:** The senior assistant registrar dismissed encl. 17 with costs.
- (q) **23 July 2001:** The notice of appeal to the judge in chambers in encl. 24 was filed. g

Now, the courts have the necessary powers to appoint Receivers and Managers in the following situations:

- (1) where the principal is said to be in arrears (*Hopkins v. Worcester and Birmingham Canal Proprietors* [1868] LR 6 Eq 437); h
- (2) where the interest is said to be in arrears (*Bissill v. Bradford Tramways Co* [1891] WN 51); i

- a* (3) where the interest is said to be postponed (*Re New York Taxicab Co, Sequin v. New York Taxicab Co. Ltd.* [1913] 1 Ch 1);
- (4) in a situation where the writ in a debenture holders' action is issued before the principal is payable or the interest is in default or in arrears, and as soon as the money becomes payable the court will have the jurisdiction and will appoint a Receiver forthwith (*Re Carshalton Park Estate Ltd, Graham v. Carshalton Park Estate Ltd, Turnell v. Carshalton Park Estate Ltd* [1908] 2 Ch 62);
- b*
- c* (5) where the company is proposing to distribute among its shareholders a reserve fund which constitutes practically its only asset (*Re Tilt Cove Copper Co Ltd* [1913] 2 Ch 588);
- (6) where the company is insolvent and its works closed entirely (*McMahon v. Northe Kent Ironworks Co* [1891] 2 Ch 148);
- d* (7) where judgments had been recovered and executions were likely to issue (*Thorn v. Nine Reefs Ltd* [1892] 67 LT 93, CA; *Edwards v. Standard Rolling Stock Syndicate* [1893] 1 Ch 574; *Re London Pressed Hinge Co Ltd, Campbell v. London Pressed Hinge Co Ltd* [1905] 1 Ch 576; and *Grigson v. Taplin & Co* [1915] 85 LJ Ch 75); and
- e* (8) where a winding up petition had been presented and the creditors were pressing for payment (*Re Victoria Steamboats Ltd, Smith v. Wilkinson* [1897] 1 Ch 158).

f But mere insolvency was held to be insufficient and that there must be threats from creditors or some jeopardy to the assets (*Re New York Taxicab Co, Sequin v. New York Taxicab Co Ltd* [1913] 1 Ch 1). However, a receiver will be appointed where the company has sold the whole, or substantially the whole, of its undertaking and assets otherwise than in the ordinary course of business, and the company has ceased to be a going concern (*Hubbuck v. Helms* [1887] 56 LJ Ch 536; and *Re Borax Co, Foster v. Borax Co* [1901] 1 Ch 326, CA).

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The following propositions of the law would also be germane to mention:

- (1) the person appointed by the court as a receiver would usually be nominated by the plaintiff in an action to enforce the security (*Budgett v. Improved Patent Forced Draught Furnace Syndicate Ltd* [1901] WN 23);
- h*
- (2) it is usually the practice to appoint a receiver based upon an affidavit showing the fitness of that receiver; and
- (3) the appointment of a receiver based on a misleading affidavit of fitness will be discharged accordingly (*Re Church Press Ltd* [1917] 116 LT 247).
- i*

That would certainly give an insight as to the appointments of Kenneth Teh Ah Kiam and Chew Hoy Ping as the Receivers and Managers. They certainly played important roles in this case. a

The Undisputed Facts

- (1) That the second and the third defendants were, at all material times, partners trading in the name and style of the first defendant – Vimla Textiles. b
- (2) That both Kenneth Teh Ah Kiam and Chew Hoy Ping were appointed as the Receivers and Managers on the business of the first, the second and the third defendants by way of an order of the Kuala Lumpur High Court *vide* suit no: D2-22-1303-97. c
- (3) That by way of a letter of offer dated 1 June 1995, the plaintiff had given credit facilities in the amount of RM2 million to the first defendant based on the terms and conditions of the letter of offer where the details have been listed in para. 6 of the amended statement of claim. d
- (4) That the second and the third defendants in their respective personal capacity had jointly and irrevocably agreed and undertaken *vide* an Indemnity Agreement dated 21 June 1995 to indemnify the plaintiff for all the claims and liabilities arising from the failure of the first defendant to comply with the terms of the letter of offer. e
- (5) It must be emphasised that on 13 July 1998, the Kuala Lumpur High Court *vide* civil suit no: D2-22-1303-1997 had granted the plaintiff's application with liberty to commence action including execution against the Receivers and Managers on the business of the second and the third defendants together with the first defendant – Vimla Textiles, to recover monies in arrears under the credit facilities given by the plaintiff to the first defendant. f

The Law On Setting Aside Judgment

Now, encl. 24 centred on the setting aside of the judgment in default of defence that was obtained against the second and the third defendants. It would therefore not be out of place to state the law in regard to it. g

For starters, it would be ideal to refer to O. 19 r. 9 of the RHC. That Order states as follows: h

The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

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- a* It is also ideal to refer to the case of *Evans v. Bartlam* [1937] 2 All ER 646, HL, especially to the speech of Lord Atkin that appears at p. 650 of the report. There his Lordship aptly said:

- b* The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

- c* *Evans v. Bartlam* (*supra*) was referred and applied by the then Supreme Court in the case of *Adzmi bin Ali & Anor v. Mohamed Isa bin Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37. Seah SCJ delivering the judgment of the then Supreme Court succinctly said:

- d* Now, when a defendant fails to enter an appearance to a writ for an unliquidated sum, the plaintiff may enter interlocutory judgment against him for damages to be assessed (see Order 13 Rule 2 of the Rules of the High Court 1980). On the other hand, if the claim of the plaintiff is for a liquidated amount and the defendant defaults in entering an appearance within the specific time, final judgment for the sum claimed may be entered against him (see Order 13 Rule 1(1)). The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order (see Order 13 Rule 8). In our opinion, the word 'judgment' in Order 13 Rule 8 means
- e* a 'final' judgment under Order 13 Rule 1(1) or an 'interlocutory' judgment under Order 13 Rule 2 thereof. The term 'interlocutory' judgment means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages. Support for such a construction may be gathered from the speeches of the Law Lords in the case of *Evans v. Bartlam* [1937] AC 473 where their Lordships held that if the default judgment was
- f* obtained regularly then there must be an affidavit of merits, meaning that the applicant/defendant must produce to the court evidence that he has a *prima facie* defence.

- g* So it can be surmised that the court always has a wide discretion to set aside or vary a judgment entered in default as a result of procedural non-compliance with the rules unless, of course, the judgment has been entered upon the merits or by consent of the parties (*Evans v. Bartlam* (*supra*)) which has been followed dutifully in *BP Malaysia Sdn Bhd v. Low Nam Hui Co Ltd* [1970] 2 MLJ 78; *Development & Commercial Bank Ltd v. Cheah Theam Swee* [1989] 2 MLJ 496; *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32, *Malayan United Bank Bhd v. Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762, *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175; *Government of Malaysia v. Sim Soe Hoe* [1990] 1 MLJ 379; *Malayan Banking Bhd & Anor v. Swasta Jaya Sdn Bhd* [1990] 1 CLJ 1096; [1990] 1 CLJ (Rep)
- i*

166, *Leong Han v. Kupusamy* [1959] 25 MLJ 95; and *Chong Kueng Ying & Ors v. Lovis Lavagna* [1971] 2 MLJ 225). Knowledge is an important ingredient in setting aside a judgment. Put in another way, a person should have notice of the proceedings against him so that a judgment may be set aside when merits are disclosed and when the court is also satisfied that:

- (a) the defendant was not aware of the proceedings; and
- (b) was not avoiding service.

It would be useful to read the case of *V.V.D.N. Sockalingam Chettiar And Two Others v. K.R.P.R.S.M. Somasundaram Chettiar* [1941] MLJ 103 at 105, CA. It is entirely up to the court to decide whether to set aside a judgment in whole or in part (*Re Rosenthal, ex P Marx* [1910] 54 Sol J. 751), and the court may even proceed, in special and appropriate circumstances, to direct the defendant to provide the necessary security for the plaintiff's costs (*Burchmore v. Hills* [1935] 79 LJ 30).

It is useful to note that O. 13 r. 8 of the RHC governs the setting aside of a judgment or varying a judgment entered in default of appearance. That entails a discretion to be exercised by the court and such similar discretion is also provided for in the following orders:

- (a) Order 14 r. 11 of the RHC;
- (b) Order 35 r. 2(1) of the RHC;
- (c) Order 70 rr. 18, 20 of the RHC; and
- (d) Order 81 r. 7 of the RHC.

Jacques v. Harrison [1883] 12 QBD 165 is an old vintage case. It postulates the following principles of law:

- (1) that a person who is not a party on record may make an application to the court to set aside a judgment where he is injuriously affected by that judgment;
- (2) where the defendant in the action who is affected by that judgment has allowed that judgment to go by way of a default; and
- (3) the defendant may proceed to set aside that judgment in his own name or someone else may do so in the name of the defendant.

- a* Procedurally speaking, the application to set aside or vary any judgment is usually made by way of a summons just like encl. 17 and sometimes, which is quite rare, it is done by way of a motion. Of course, an application of this nature must be supported by an affidavit and the application must be filed within a reasonable time. However, in certain circumstances, the court may
- b* disregard the lapse of time or the delay in filing the application in a fit and proper case. Each case would surely depend on the facts as presented to the court (*Beale v. MacGregor* [1886] 2 TLR 311; *Atwood v. Chichester* [1878] 2 QBD 722; *Davis v. Ballenden* [1882] 46 LT 797; *Ban Huat Seng Co. Ltd v. Lee Poh Soo* [1967] 1 MLJ 145; and *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175 at 184).
- c*

The affidavit must be wholesome. Depending on whether the judgment entered was regular or irregular, it is always prudent on the part of the defendant to disclose the merits of his case. In addition to that the defendant too must aver as to the:

- d*
- (1) nature of the irregularity as well as to the,
 - (2) circumstances surrounding the manner in which the default arose.

- e* As to what constitutes “defence on the merits”, reference should be made to the case of *Burns v. Kondel* [1971] 1 Lloyd’s Rep. 554 where Lord Denning MR explained that phrase to mean “a defence which discloses an arguable and triable issue”. A regular judgment is a judgment which has complied with the rules and it can only be set aside on the merits as shown in the affidavit evidence.

- f* What is the standard of proof required of the defendant in order to set aside or vary the judgment? It is said that the defendant must show:

- (a) that it has a “*prima facie* defence” (per Lord Atkin in *Evans v. Bartlam* (*supra*) at p. 650);
- g*
- (b) that the defence is “not a sham” (per Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329); and
- h*
- (c) that the “primary consideration is whether he has merits, to which the court should pay heed; if merits are shown, the court will not *prima facie* desire to let pass a judgment on which there has been no proper adjudication” (per Lord Wright in *Evans v. Bartlam* (*supra*) at p. 656).

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And that no judge could, “in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action; and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence” (per Lord Russell Of Killowen in *Evans v. Bartlam* (*supra*) at p. 651).

That would be the brief discourse on the law.

The Issue Of Delay

I will now allude to the preliminary issue in regard to the delay on the part of the second and the third defendants in filing the application in encl. 17 to set aside the judgment in default of defence. I did say earlier that the court may disregard the lapse of time or the delay in filing the application in a fit and proper case. That would entirely be an exercise in judicial discretion. For the reasons as set out hereinunder, I ruled that the delay was detrimental to the plaintiff. Now, on delay, I need to refer to O. 42 r. 13 of the RHC which states as follows:

13 Setting aside or varying judgments and orders (O. 42 r. 13)

Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

The Court of Appeal in *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396 (February 1997 issue) speaking through Gopal Sri Ram JCA had this to say in regard to the issue of delay that cropped up in that case (see p. 401 to p. 402 of the report):

It is a cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a Court may refuse relief to an indolent litigant.

In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.

a The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 at p. 247; [1996] 1 AMR 215. It is a decision of the Federal Court and therefore quite plainly binds this Court. There, Edgar Joseph Jr. FCJ, said (at p. 225):

b The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made:

- c**
- (a) with reasonable promptitude, in other words within a reasonable time and
 - (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court 1980).
- d**

In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarise his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

e Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 at p. 152; [1995] 1 MLJ 457, at p. 490, per VC George JCA.

f But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

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There was contumacious delay on the part of the second and the third defendants in filing the application to set aside the judgment. The delay came up to sixteen (16) months from the date of receipt of the judgment on 16 September 1999. To aggravate the matter further, the third defendant had, prior to filing the application, taken fresh steps sufficient to amount to a waiver of any irregularities of the judgment by proceeding to accept the bankruptcy notice on 1 March 2000 and the creditor's petition on 10 October 2000. In chronological order, the facts may be stated in this manner:

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- | | | | |
|-------------------|---|---|----------|
| 20 April 1999 | – | service of the amended statement of claim on the third defendant | a |
| 16 September 1999 | – | service of the judgment in default of defence on the third defendant. | |
| 1 March 2000 | – | third defendant's acceptance of the bankruptcy notice by way of personal service. | b |
| 10 October 2000 | – | third defendant's acceptance of the creditor's petition by way of personal service. | |

Interestingly, the reasons for the delay were provided by the third defendant on behalf of herself and that of the second defendant and this was stated by her in her affidavit in encl. 18 at para. 18 thereto (the relevant parts thereof): **c**

Selanjutnya saya juga berikrar bahawa saya tidak dapat membuat permohonan ini secepat mungkin oleh kerana kesemua perniagaan saya dan defendan kedua telah diletak ke atas Penerima dan Pengurus dan saya tidak mempunyai sumber kewangan untuk melantik peguamcara-peguamcara untuk mempertikaikan tuntutan plaintiff ini serta tuntutan-tuntutan lain oleh Institusi-Institusi kewangan yang lain akibat daripada perlantikan Penerima dan Pengurus. **d**

Financial constraints and the appointment of the Receivers and Managers to take charge of the business of the first defendant and the second defendant were the reasons advanced for the delay. These two reasons were certainly untenable in the circumstances and could not be accepted by this court. The defendants not only engaged a firm of solicitors to set aside both the bankruptcy notice on 13 June 2000 and the judgment on 19 January 2001 but also could afford the luxury of changing to the present firm of solicitors to represent them in the present appeal in encl. 24. In this connection, I need to refer to the speech of Edgar Joseph Jr FCJ in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, especially at pp. 253-254 of the report where his Lordship said: **e**

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By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable explanation, which the judge had no hesitation in dismissing as 'ludicrous', that he had allowed judgment in default to go against him because he could not afford to engage solicitors. Having regard to his business status and experience, we agreed with the judge that this was a 'ludicrous' explanation, and was therefore unacceptable. **g**

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a I have said something about the Receivers and Managers in the early part of this judgment. And putting the blame on the Receivers and Managers, just like what the third defendant did, when things went wrong was not a wise move at all. It must be borne in mind that the Receivers and Managers were appointed by the court. And I may add that the Receivers and Managers, in law, may

b be construed as an agent of the company before liquidation (*United Malayan Banking Corporation Bhd v. Official Receiver & Liquidator of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor.* [1986] 1 MLJ 75; and *Saripah bte Manap & Ors v. Emar Sdn. Bhd. (In dissolution) & Ors* [1997] 4 CLJ 194). Likewise here, both Kenneth Teh Ah Kiam and Chew Hoy Ping were agents not only

c for the first defendant – Vimla Textiles, but also for the second and the third defendants. The Receivers and Managers in this case were certainly appointed by the court for the good of the defendants and they too may be considered as officers of the court (*Moss Steamship Co. Ltd v. Whinney* [1912] AC 254, 266). In *Setapak Tin Syndicate Ltd. and Another v. Choo Kim Peng* [1947]

d MLJ 174, Willan CJ had occasion to consider an application for the appointment of a receiver in respect of two companies in voluntary liquidation and his Lordship held that before such a relief could be granted, three conditions must be satisfied, namely “(a) that the plaintiff has established a good *prima facie* to title and also (b) that the property is in jeopardy or (c) at the very least that the party who makes the application will be in a worse situation if

e the appointment of a receiver is delayed”. The same approach was also adopted by Yusoff Mohamed J in *Matang Holdings Bhd & Ors. v. Dato Lee San Choon & Ors* [1985] 2 MLJ 406. *Kerr on Receivers*, 11th edn at para. 6 aptly said:

f If the court is satisfied upon the materials it has before it that the party who makes the application has established a good *prima facie* title, and that the property the subject matter of the proceedings will be in danger if left until the trial in the possession or under the control of the party against whom the receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the

g appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course.

Clearly therefore the appointment of the Receivers and Managers being for the good of the defendants, it was therefore pointless for the second and the third defendants to blame their appointments for the delay in filing the application

h to set aside the judgment. It was ludicrous to do so.

At any rate, the explanation for the delay was inconsistent with the conduct of the defendants. For instance, in the originating summons no: S3-24-216-99 which was an action for the realisation of the security for the credit facility

i provided by the plaintiff, the third defendant had as early as September 1999

appointed a previous firm of solicitors to attend a hearing of the plaintiff's summons for directions for the purpose of, *inter alia*, fixing an auction date and the reserve price in the foreclosure proceedings. This was what had actually happened despite the fact that the Receiving and Adjudicating Orders against the second and the third defendants were only set aside on 15 October 1999. Regrettably, so it was submitted, that the evidence in relation to the Receiving and Adjudicating Orders obtained by Southern Bank had not been alluded to at all by the second and the third defendants in their affidavit in encl. 18. That being the case, it was submitted that the explanation that the solicitors of the defendants were unable to represent them to file their defence should not be accepted by this court. I agreed entirely with these salient submissions.

It must be borne in mind that the effect of the *ex parte* order dated 19 December 1997 was only limited to the business and assets of the defendants in direct connection with Vimla Textiles and/or Vimtex Sdn Bhd, and it did not include the personal business and assets of the second and the third defendants. The deposition in the affidavit of the third defendant in encl. 18 indicated that the third defendant is still a businessman and that this application had been filed by the second and the third defendants in their personal capacity and not through or with the leave of the Receivers and Managers. Both the second and third defendants were obliged to offer a satisfactory explanation in regard to the delay and they cannot simply rely on the allegation that the judgment was purportedly null and void.

There was, with respect, an utter lack of candour on the part of the second and the third defendants. There must be in the words of Edgar Joseph Jr SCJ in *Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd and Ors* [1994] 2 CLJ 646 a "full, frank, candid and honest disclosure of all the relevant facts", but unfortunately there was none here. The preliminary issue on the delay should be decided in favour of the plaintiff. Nothing less and nothing more.

I must now proceed to the other related issues raised by the second and the third defendants, not in its order of priority.

The Document Known As The "Indemnity By Partners" – Does That Document Amount To A Guarantee By The Partners Or A Mere Indemnity?

In regard to the document styled as "Indemnity By Partners" as seen in exh. "CSF3" of encl. 19, it was, in my judgment, an agreement of indemnity and not a letter of guarantee. The basis of this action against the defendants may be stated as follows:

- a* (a) the action against the first defendant was based on the letter of offer dated 1 June 1995 as seen in exh. “CSF5” of encl. 19; and
- (b) the action against the second and the third defendants in their personal capacity was based on the document entitled “Indemnity By Partners” dated 21 June 1995 as seen in exh. “CSF3” of encl. 19.
- b*

A contract of indemnity is defined in s. 77 of the Contracts Act 1950 to mean:

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.

- c*
- A contract of indemnity is therefore, according to a string of authorities, to be nothing more than “a contract by one party to keep the other harmless against loss” (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at 830-831; *Total Oil Products (Aust) Pty Ltd v. Robinson* [1970] 1 NSW 701 at 703; and *Davys v. Buswell* [1913] 2 KB 47 at 53-55). It is a contract to indemnify the other party against any loss. And that the obligation has no reference in law to the debt of another (*Clipper Maritime Ltd v. Shirlstar Container Transport Ltd* [1987] 1 Lloyd’s Rep 546 at 555; and *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778 at 784). In *Hong Leong Finance Bhd v. Thamilshelevan s/o Palinesamy & Anor* [1996] 1 CLJ 471, I had occasion to say at p. 478 of the report the following:
- d*
- e*

Whereas the contract of indemnity is said to be ‘a contract by one party to keep the other harmless against loss’ (*Yeoman Credit Ltd v. Latter* [1961] 2 All ER 294; [1961] 1 WLR 828 at pp. 830-831), and is not dependent on the continuing liability of the principal debtor. Be that as it may, in the final analysis, it is the court that will be called upon to decide whether the contract is one of indemnity or that of a contract of guarantee. But what is germane to remember is this: where the words ‘guarantee’ or ‘indemnity’ appear in the agreement, these are indications of the intentions of the parties, especially so if the expressions are repeated a number of times, over and over again (*Heald v. O’Connor* [1971] 2 All ER 1105; [1971] 1 WLR 497 at p 503), or those expressions appear in the headings of the agreements (*Goulston Discount Co Ltd v. Clark* [1967] 2 QB 493, [1966] 3 WLR 1280, [1967] 1 All ER 61).

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- h* It was entirely my domain to determine whether the “Indemnity By Partners” marked as exh. “CSF3” of encl. 19 was a contract of indemnity or a contract of guarantee. Clause 28 of the “Indemnity By Partners” defines certain expressions and it would be ideal to refer to it. Thus, the expression “this Indemnity” appearing in cl. 28 (i) of the “Indemnity By Partners” shall mean and extend to every separate and independent stipulation and provision contained

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therein. The expression “the borrowers” appearing in cl. 28 (iv) of the “Indemnity By Partners” makes reference to Lal Bhojraj Khanchandani (the second defendant) and Sarinder Kaur d/o Sohan Singh (the third defendant) and they both trade under the name and style of Vimla Textiles (the first defendant). The expression “the Indemnifiers” appearing in cl. 28(v) of the “Indemnity By Partners” again refers to Lal Bhojraj Khanchandani (the second defendant) and Sarinder Kaur d/o Sohan Singh (the third defendant). While the expression “the Bank” appearing in cl. 28 (vi) of the “Indemnity By Partners” refers to The Pacific Bank Berhad (the plaintiff) and it includes its successors-in-title and assigns.

Now, every contract of guarantee necessarily involves and refers to three distinct parties, namely, the surety, the creditor and the principal debtor. Here, the “Indemnity By Partners” involves and refers to different parties, namely, the borrower, the indemnifier and the bank. That being the case, the “Indemnity By Partners” cannot be construed as a contract of guarantee. Rather, it is a contract of indemnity. In *Ling Sing Hung & Ors v. Kontiki Trading Pte Ltd* [1998] 4 CLJ 345, Gopal Sri Ram JCA speaking for the Court of Appeal said at p. 350 of the report:

In our judgment, the contractual incident provided for by s. 86 governs only guarantees because it refers to the tripartite relationship of surety, creditor and principal debtor; expressions which, by definition, subsist under a contract of guarantee. Section 86 therefore has no application whatsoever to contracts of indemnity. (See *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 2 MLJ 355).

And at pp. 350-351 of the report, his Lordship in serious tone said:

We accept as settled law that the true nature and character of a document is not revealed merely by the label that parties give it. It is for the court to construe the document and determine what it really is. In the present case, it is clear from the wording of the documents and the surrounding circumstances that they were intended to be something more than mere guarantees. This tells in favour of them being in truth indemnities. They are more consistent with a primary obligation on the second and third appellants to secure the respondent against loss if the transaction should turn out unremunerative, rather than a secondary obligation to make good the particular defaults of the company. There was here neither surety, creditor nor principal debtor. And, as Lord Selborne observed in the leading case of *Lakeman v. Mountstephen* [1874] LR 7 HL 17 at p. 24:

a There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

b Since the letters of indemnity upon which the second and third appellants were sued are not guarantees, s 86 of the Act has no application. The variation relied upon by these appellants does not therefore have any effect upon the primary obligation undertaken by them. The trial judge was therefore entirely correct in holding the second and third appellants liable on the two letters of indemnity.

c At this juncture, it would be germane to refer to the relevant clauses in the "Indemnity By Partners" annexed as exh. "CSF3" of encl. 19 in order to highlight that it is, in fact, a contract of indemnity. Clause 1 of the "Indemnity By Partners" states as follows (the relevant parts):

d ... (hereinafter collectively called 'the Indemnifiers') HEREBY JOINTLY AND SEVERALLY IRREVOCABLY AND UNCONDITIONALLY UNDERTAKE AND AGREE TO FULLY AND EFFECTUALLY INDEMNIFY AND KEEP FULLY AND EFFECTUALLY INDEMNIFIED at all times the Bank and its goods and effects against any and all losses, claims, damages, liabilities, demands, costs, charges and expenses, whatsoever, arising out of or in connection with ...

e While cl. 8 of the "Indemnity By Partners" reads as follows:

f The Indemnifiers shall pay or reimburse to the Bank, IMMEDIATELY UPON DEMAND by the Bank:

- (i) all sums due and owing under and or in respect of the Facilities which the Borrowers shall fail or neglect to pay or reimburse to the Bank on demand; and
- g** (ii) all costs, charges and expenses incurred by the Bank in connection with the enforcement of or the preservation of any rights under this Indemnity, including, but not limited to, the fees and expenses of its legal advisers.

h It must be emphasised that the plaintiff's letter of demand to the second and the third defendants dated 18 March 1998 as reflected in exh. "CSF8" of encl. 19 was worded in line with cl. 8 of the "Indemnity By Partners" and in accordance with the contract of indemnity and that the word "Borrowers" has no reference to third parties like in the case of a contract of guarantee. The plaintiff's letter of demand was worded in this way:

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18 March 1998 EY/178-162/BL/98/PACT/VT *a*

Lal Bhojraj Khanchandani Registered Post

No. 10, Jalan Melayu

50100 Kuala Lumpur Ordinary Post

and/or

Sarinder Kaur a/p Sohan Singh Registered Post *b*

No. 10, Jalan Melayu

50100 Kuala Lumpur Ordinary Post

Dear Sirs/Madam,

**Re: Outstanding Sum of RM274,015-04 owing by Vimla Textiles
(‘Borrower’) to the Pacific Bank Berhad** *c*

1. We act for the Pacific Bank Berhad, Wisma Hangsam, Jalan Hang Lekir,
50000 Kuala Lumpur.

2. Our client instructs us to state that by a Partners’ Indemnity dated 21st
June 1995 (‘Indemnity’), you have jointly and irrevocably undertaken and
agreed to fully indemnified at all times to our client all losses, claims
and liabilities whatsoever arising out of the failure of the Borrower to
perform its obligations under the Letter of Offer dated 1st June 1995
(‘Letter of Offer’). *d*

3. Our client instructs us to inform you that the Borrower has refused,
neglected and/or failed to repay the sum due and owing to our client
under the Letter of Offer and claimed by our client vide our client’s letter
dated 20th February 1998. *e*

4. In consequence of paragraph 3 above, our client has also instructed us
to inform you that they have uplifted the Borrower’s fixed deposit
amounting to RM1,000,000-00 together with interest thereon and set off
the said amount from the sum due and owing. The amount due and
owing to our client as at 10th March 1998 are as follows: *f*

(a) Overdraft Facility *g*

(i) Sum owing RM194,179.71

(ii) Interest at the rate of RM 746.91
4% and Base Lending Rate
(12% from 5th March 1998) *h*

(iii) Total amount owing RM194,921.62

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<i>a</i>	(b) Banker's Acceptance Facility	
	(i) Sum owing as at 28th February 1998	RM1,279,972.50
	(ii) Amount set off from uplifting of Fixed Deposit	RM1,200,917.82
<i>b</i>	(iii) Sum due and owing to our client	RM 79,054.68
	(iv) Interest at the rate of 4% and Base Lending Rate (12% from 5th March 1998)	RM 38.74 -----
<i>c</i>	(v) Total amount owing	RM 79,093.42 =====

5. TAKE NOTICE, we have been instructed to demand from you pursuant to the Indemnity which we hereby do the following sums:

- d* (a) Total amount owing under Overdraft Facility of RM194,921-62 together with interest thereon at the rate of 4% and Base Lending Rate (currently at 12%) from 11th March 1998 till date of full payment.
- e* (b) Total amount owing under Banker's Acceptance Facility of RM79,054-68 together with interest thereon at the rate of 4% and Base Lending Rate (currently at 12%) from 11th March 1998 to date of full payment.

f **AND UNLESS** the aforesaid outstanding sums are paid to our client directly or to us as solicitors for our client within seven (7) days from the date hereof, we have strict instructions to commence legal proceedings to recover the same from you without further reference to you.

6. **TAKE FURTHER NOTICE** that in the event legal proceedings are commenced as aforesaid, you may be liable for further costs and expenses.

g Yours faithfully,
Sgd. (Illegible)
EY/se/ella

c.c. Client – By Fax (2309332)/Post
Attn: Ms. Tan Siok Eng.

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I will now reproduce cl. 13 (b) of the "Indemnity By Partners" and it reads as follows:

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The obligations of the Indemnifiers shall not be subject to any prior notice to or demand on the Indemnifiers with regard to any default of the Borrowers. a

Again, the usage of the word “borrowers” has no reference, at all, to third parties like in the case of a contract of guarantee.

In my judgment, it would not be decisive whether the instrument is a contract of indemnity or a contract of guarantee by merely looking at the labels (*Total Oil Products (Aust) Pty Ltd v. Robinson* [1970] 1 NSW 701; and *Western Credit Ltd v. Alberry* [1964] 2 All ER 938 at 940). Labels such as “guarantee” or “indemnity” appearing in the instrument may indicate the intentions of the parties to the contract. It would be of great help to the court if the labels appear on a number of occasions as alluded to in *Hong Leong Finance Bhd v. Thamilchelevan s/o Palinesamy & Anor (supra)* or like the present case the label “Indemnity” appears at the heading of the instrument in a prominent way (*Goulston Discount Ltd v. Clark* [1967] 2 QB 493 at 498 per Danckwerts LJ; *Western Credit Ltd v. Alberry (supra)* per Davies LJ; and *Crown Lumber Co Ltd v. Engel* [1961] 28 DLR (2d) 762). But it is always ideal to look at the instrument itself and consider it in its correct perspective (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at 833) and I am doing just that. Now, the expressions like “Indemnifiers”, “indemnify”, “indemnified” and “indemnity” appear in the “Indemnity By Partners”. Looking at cls. 1, 8 and 13(b) of the “Indemnity By Partners” as reproduced earlier, the expression the “Indemnifiers” was used four (4) times, and the expressions “indemnify”, “indemnified”, and “indemnity” were mentioned once only. The title to the contract carries the word “Indemnity” and so I must conclude that the parties herein intended to create a contract of indemnity and not a contract of guarantee. This was my judgment and I so hold accordingly. b
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An Added Obligation To Pay Money Cannot Be Described As A “Guarantee”

It was submitted on behalf of the second and the third defendants that they cannot guarantee the payment of money given by the plaintiff to the first defendant – Vimla Textiles. Put differently, they cannot guarantee the payment of the money by themselves. In other words, they cannot guarantee the payment of their own debt. This argument presupposes that the contract between the parties was a contract of guarantee. That supposition was wrong. I have held for the reasons adumbrated above that the contract between the parties was a contract of indemnity. At any rate, there was no barrier for the second and the third defendants to undertake an additional obligation by way of a contract of indemnity to pay money which they were already bound to pay as partners and as borrowers. For this proposition, I must refer to the case of *I.A.C. (Singapore) Pte. Ltd. v. Koh Meng Wan* [1979] 2 MLJ 9, 10 where Sinnathuray J said: g
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a The defendant, as a partner of AAC, was a debtor of the plaintiffs. It was contended therefore that he was not a competent person to be a guarantor. The question was posed: Can a person guarantee the payment of his own debt? To answer it, Miss Quek for the defendant referred me to the case of *Bank of New South Wales v. Permanent Trustee Company of New South Wales Limited* 68 CLR 1 Latham CJ at page 11 said:

b A person cannot guarantee the payment of money by himself. He may undertake an additional obligation to pay money which he is already bound to pay, but that added obligation cannot be described as a guarantee. A guarantee is essentially a promise to answer for the debt, default or miscarriage of another, and it does not include as such the case of a person incurring an additional liability in respect of a sum of money for which he is already liable.

c Thus, “incurring an additional liability for which” the second and the third defendants were already liable was not wrong in law. It was good in law and enforceable.

d **Was The Interest Rate Imposed By The Plaintiff Excessive?**
Certainly not.

e The indemnity by the partners did not provide for the rate of interest that was imposed by the plaintiff. But, the rate of interest was provided for in the letter of offer dated 1 June 1995 as seen in exh. “CSF-5” of encl. 19. That letter of offer provides for interest at the rate of 4% per annum above the BLR upon the termination of the first defendant’s banking facility and this was duly informed by the plaintiff by way of a letter of demand dated 20 February 1998 to the first defendant as reflected in exh. “CSF6” of encl. 19. Thereafter, the plaintiff had reduced the interest rate to 2.5% per annum above the BLR in accordance with the directive of Bank Negara Malaysia – the Central Bank of Malaysia, as seen in exh. “CSF7” of encl. 19 and that directive was dated 15 September 1998. To say as was said by the second and the third defendants that the interest rate that was imposed was excessive was not true. It was an allegation that was baseless and rather frivolous and vexatious, to say the least.

f It must be borne in mind that the plaintiff was relying on cl. 12 of the “Indemnity By Partners” to ground its case. That cl. 12 states that a certificate in writing by an officer of the plaintiff which certifies the total amount due at any time by the Borrowers to the plaintiff shall (in the absence of any manifest error) be conclusive of the matters so certified and binding on the second and the third defendants. So, it can be surmised that the plaintiff’s certificate of indebtedness on the accounts of the borrowers as at 30 October 1998 as seen in exh. “CSF11” of encl. 19 dispensed with the requirement of the plaintiff to

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prove the defendants' debts. In short, the plaintiff was not obliged to produce any ledgers or any other statements to show the interest rate that was imposed on the loan and/or when the variation of the interest rate had taken place.

Has The Plaintiff Furnished Particulars On The Fixed Deposit Certificate Which Was Utilised By The Plaintiff To Set-off The Banking Facility Owning By The First Defendant?

The plaintiff's letter of demand dated 18 March 1998 as reproduced earlier was very clear. It showed that the plaintiff had furnished particulars to the second and the third defendants in regard to the amount of set-off as detailed therein. It was obvious from the tenor of that letter (see exh. "CSF8" of encl. 19) that a specified amount in the sum of RM1,200,917.82 was accordingly set-off from the fixed deposit amounting to RM1,000,000 together with interest thereon on or about 28 February 1998, while the interest accruing from the fixed deposit was RM200,917.82 as at 28 February 1998. It would be apparent that the letter of set-off and the memorandum of deposit as reflected in exhs. "CSF9" and "CSF10" of encl. 19 were signed by the second and the third defendants as partners of the first defendant and these documents permitted the plaintiff to utilise the funds from the fixed deposit in order to set-off the banking facility that was owing by the first defendant.

The second and the third defendants alleged that they had not received the letter dated 18 March 1998 as seen in exh. "CSF8" of encl. 19. That was a mere allegation and I took note of the fact that the address at No: 10, Jalan Melayu, 50100 Kuala Lumpur that appeared on that letter was, in fact, the last known address of the second and the third defendants available to the plaintiff. Unless and until the second and the third defendants could prove that they had duly notified the plaintiff in writing on the change of their new address with effect from 3 January 1998, the address at No: 10, Jalan Melayu, 50100 Kuala Lumpur remained the last known address, on record, of the second and the third defendants. The principle of estoppel should apply here wherein both the second and the third defendants should be estopped and be prevented from denying the receipt of the letter of demand dated 18 March 1998 as seen in exh. "CSF8" of encl. 19. Both the second and the third defendants must be held to be bound by cl. 11(a) of the "Indemnity By Partners" as per exh. "CSF3" of encl. 19 and that clause is worded as follows:

All notices, requests, demands, certificates or other communications to or upon the Indemnifiers and the Bank shall be deemed to have been duly given or made if addressed to their respective addresses shown above or to such other address as may be notified in writing by the Indemnifiers to the Bank or by the Bank to the Indemnifiers from time to time for this purpose.

a I have said that the principle of estoppel should be applied against the second and the third defendants and for this exercise the speech of Sir Owen Dixon CJ speaking in the High Court of Australia in the case of *Thompson v. Palmer* [1933] 49 CLR 507 at p. 547 should be referred to. In style, his Lordship said this:

b The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co. v. Craine* [1922] 2 AC 541, at pp. 546-547; cp. *Cave v. Mills* [1862] 7 H & N 913, at pp. 927-928; *Smith v. Baker* [1873] LR 8 CP 350, at p. 357; *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co.* [1921] 2 KB 608, at p. 612; and *Ambu Nair v. Kelu Nair* [1933] 60 LR LA 266, at p. 271; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted.

f The wholesome speech of Sir Owen Dixon CJ analysed the law of estoppel in all its splendour and it should be vigorously applied against the second and the third defendants.

g **Was There Manifest Error On The Face Of The Certificate Of Indebtedness?**

In my judgment it was not necessary that the certificate of indebtedness as seen in exh. "CSF11" of encl. 19 as reproduced below:

**CERTIFICATE OF INDEBTEDNESS
STATEMENT OF ACCOUNTS AS AT 30-10-1998**

- h*
1. LAL BHOJRAJ KHANCHANDANI
 2. SARINDER KAUR A/P SOHAN SINGH

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Outstanding under Overdraft Facility **RM216,050.88** *a*

Interest on daily rest at 2.5% p.a. above the Bank's Base Lending Rate from 01-11-1998 to date of full settlement.

Outstanding under Banker's Acceptance Facility **RM87,586.03** *b*

Interest on monthly rest at 2.5% p.a. above the Bank's Base Lending Rate from 01-11-1998 to date of full settlement.

For Maybank Berhad
(Wisma Hangsam Branch)
Sgd. (Illegible) *c*
Authorised Signature
(Loans Admin. Dept.)

had to clarify the issues raised by the second and the third defendants because:

(a) the plaintiff's BLR for both sums was 8.50% per annum as at 31 October 1998, and it has been duly notified to the defendants as reflected in the particulars under para. 13 of the amended statement of claim as seen in encl. 8; *d*

(b) the plaintiff's letter of demand dated 18 March 1998 as seen in exh. "CSF8" of encl. 19 clearly explained to the second and the third defendants that the plaintiff had on or about 28 February 1998 uplifted the fixed deposit and accordingly set-off the sum of RM1,200,917.82 from the amount due and owing by the first defendant under their banking facilities; and *e*

(c) that since the date of filing of the writ fell on 30 November 1998, the closest "cut-off" point for the purpose of computation of the interest in the certificate of indebtedness would be on 1 November 1998. *f*

In my judgment, the particulars in para. 13 of the amended statement of claim as reproduced below (as per encl. 8): *g*

Defendan Pertama dan/atau Penerima dan Pengurus Defendan Pertama, Defendan Kedua dan Defendan Ketiga telah enggan, abai dan/atau gagal untuk mematuhi surat-surat tuntutan bertarikh 25.3.98 dan 18.3.98 masing-masing. Defendan Pertama, Kedua dan Ketiga masih berhutang kepada Plaintiff dalam jumlah sebanyak RM303,636.91 setakat 31.10.98 bersama-sama faedah ke atasnya, di mana butir-butir ringkas adalah seperti berikut: *h*

i

*a***BUTIR-BUTIR****Jenis Kemudahan****Jumlah Tertunggak**

Overdraf

RM216,050.88 setakat 31.10.98 bersama-sama faedah ke atasnya pada kadar 2.5% setahun atas Kadar Pinjaman Asas Plaintiff (yang mana adalah 8.50% pada 31.10.98) atas rehatan harian dari 1.11.98 sehingga tarikh penyelesaian penuh.

b

Bankers Acceptance

RM87,586.03 setakat 31.10.98 bersama-sama faedah ke atasnya pada kadar 2.5% setahun atas Kadar Pinjaman Asas Plaintiff (yang mana adalah 8.50% pada 31.10.98) atas rehatan bulanan dari 1.11.98 sehingga tarikh penyelesaian penuh.

c

were pleaded with sufficient clarity. In the words of Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 139:

d

... it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

e

A perusal of para. 13 of the amended statement of claim as reproduced above showed that the defendants would surely know what to expect because the material facts had been pleaded (*N.W. Salt Co. Ltd. v. Electrolytic Alkali Co., Ltd.* [1913] 3 KB 425). Thus, when one reads para. 13 of the amended statement of claim with the certificate of indebtedness in exh. "CSF11" of encl.

f

19, one can certainly discern that both the statements of accounts are complete and consistent with each other and this would, in turn, enable the second and the third defendants to know without any ambiguity about the actual amount owing by the first defendant to the plaintiff. It was for these reasons that I hold that there was no manifest error whatsoever on the face of the certificate of indebtedness. It was part and parcel of my judgment that the certificate of

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indebtedness was conclusive on matters that have been so certified and that it was binding on the second and the third defendants. According to the case of *United Malayan Banking Corp Bhd v. Tan Kay Hock* [1997] 4 CLJ 717, to be conclusive the certificate of indebtedness had to be consistent with the statement of claim. In the same vein reference to the case of *Malayan Banking*

h

Bhd v. Yeo Sun Tong [1999] 4 CLJ 425 should also be referred to. Here, in the present case, the certificate of indebtedness was consistent and in tandem with the amended statement of claim as demonstrated earlier.

i

Whether Leave Was Required To Be Obtained By The Plaintiff In Order To Commence An Action Against The Second And The Third Defendants?

Now, the plaintiff realised that the Receivers and Managers had been appointed on the business of Vimla Textiles – the first defendant, by way of a court order dated 19 December 1997 that was obtained by Sime Bank Bhd in the Kuala Lumpur High Court *vide* civil suit no: D2-22-1303-1997 as per exh. “SK4” of encl. 18. With this factual knowledge, the plaintiff had subsequently obtained the leave of the court in the Kuala Lumpur High Court *vide* civil suit no: D2-22-1303-1997 on 13 July 1998 in order to proceed with the action including execution against the Receivers and Managers on the business of the second and the third defendants who were both trading as Vimla Textiles as well as against the first defendant itself and that would be Vimla Textiles and this can be seen at exh. “SK6” of encl. 18. So, once the plaintiff obtained the leave of the court the plaintiff forthwith commenced action against the following parties:

- (a) the Receivers and Managers on the business of the second defendant and the third defendant who were both trading as Vimla Textiles as well as against the first defendant and that would be Vimla Textiles and this was based on the letter of offer dated 1 June 1995 as seen in exh. “CSF5” of encl. 19; and
- (b) the second and the third defendants as individuals and/or in their personal capacity distinct and separate from their trading and business in Vimla Textiles – the first defendant, and this was based on the “Indemnity By Partners” dated 21 June 1995 as seen in exh. “CSF3” of encl. 19.

It would be correct to say that the second and the third defendants have clearly misunderstood the court order as seen in exh. “SK4” of encl. 18 in that all their personal assets have been restrained by the said court order. Both the second and the third defendants interpreted the court order in exh. “SK4” of encl. 18 in a misleading manner because the fact that the second and the third defendants could file the application in encl. 17 in their personal capacity was totally inconsistent with what they had alleged. This clearly showed that both the second and the third defendants have the right to control and utilise their personal assets in engaging solicitors to act on their behalf without requiring leave to be obtained from the court and/or from the Receivers and Managers. In my judgment, from the prevailing facts the plaintiff has a right of indemnity against and/or from the personal assets of the second and the third defendants. It was also my judgment that the personal assets of the second and the third defendants have no connection whatsoever with their partnership assets in respect of Vimla Textiles and so they were not within the control and jurisdiction of the Receivers and Managers appointed by the court.

- a* It is pertinent to mention that the second and the third defendants have appealed to the Court of Appeal against the *ex parte* order as exhibited in “SK4” of encl. 18 and not “SK6” of encl. 18 as alleged. The order of the Court of Appeal dated 8 January 1998 as seen in exh. “SK7” of encl. 18 saw the Receivers and Managers being ordered to preserve the partnership assets and properties which related to and confined to those belongings of the appellants/ applicants (referring to the second and the third defendants trading as Vimla Textiles) and/or Vimtex Sdn Bhd which have no connection at all with the personal assets of the second and the third defendants.

- c* Now, by way of a summary, I must hold that leave of the court was not required to commence an action against the second and the third defendants as individuals and in their personal capacity. The reason being, and this cannot be disputed, that the plaintiff’s right of indemnity against and/or from the personal assets of the second and the third defendants could not be said nor could it be deemed to be an interference of the assets within the control of the appointed Receivers and Managers. The case of *Sime Bank Bhd v. Lal Bhojraj Khanchandani & Ors* [1999] 6 CLJ 168 can readily be distinguished. There the Receivers and Managers had been appointed by the court on the assets of the third defendant – Vimla Textiles, and hence the leave of the court was required to commence a charge action against the assets that were under the control and jurisdiction of the Receivers and Managers. Here, before me, the issue raised by the second and the third defendants in regard to the power of the Receivers and Managers to deal and operate with the first defendant’s fixed deposit of RM1 million in any manner whatsoever was a non-starter. By way of a short reply, it must be pointed out that the plaintiff was entitled under the letter of set-off in exh. “CSF9” of encl. 19 to uplift the fixed deposit and set-off the amount and accrued interest therein from the outstanding banking facilities. And notwithstanding the fact that the plaintiff’s action against the second and the third defendants was filed after the appointment of the Receivers and Managers, the plaintiff had on 23 June 1999 obtained judgment under O. 14 of the RHC against the Receivers and Managers for the first defendant.
- d*
- e*
- f*
- g*
- h*
- Thus, the custody and control of the money in the fixed deposit by the Receivers and Managers was not an issue, whether triable or otherwise, at the said O. 14 hearing and ought not to be re-opened by the second and the third defendants bearing in mind that the Receivers and Managers have not subsequently appealed against the said judgment. Precisely put the High Court order dated 19 December 1997 and the Court of Appeal order dated 8 January 1998 were already in place when the plaintiff obtained leave of the court in the Kuala Lumpur High Court *vide* civil suit no: D2-22-1303-1997 on 13 July 1998 to proceed with the action including execution against the Receivers and

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Managers on the business of the second and the third defendants who were both trading as Vimla Textiles as well as against the first defendant and that would be Vimla Textiles as reflected at exh. "SK6" of encl. 18.

a

Has The Judgment Dated 24.6.1999 Referred To An Unspecified Interest Rate?

b

The interest rate for the overdraft facility was 2.5% per annum above the plaintiff's BLR as shown in the judgment dated 24 June 1999 in exh. "SK1" of encl. 18. This was the rate of interest which the plaintiff was entitled to levy on the outstanding sum when the overdraft facility had been recalled. Clause 4.1(f) of the letter of offer marked as exh. "CSF5" of encl. 19 states that:

c

If the OD is recalled, interest of 4% above the Bank's BLR will be levied on the outstanding sum recalled.

But the plaintiff, in compliance with the Bank Negara Malaysia's directive dated 15 September 1998, had accordingly reduced the interest rate for the overdraft facility to 2.5% per annum above the plaintiff's BLR. This reduction can be seen in the amended statement of claim as well as in the judgment dated 24 June 1999 as per exh. "SK1" of encl. 18. Now, the rate of interest for the banker's acceptance would be 2.5% per annum above the plaintiff's BLR as shown in the judgment dated 24 June 1999 and this was the rate of interest which the plaintiff was entitled to levy on all past sums due on the banker's acceptance if there was no overdraft/trust receipt facility. And since the overdraft facility had been recalled, the plaintiff would definitely rely, so the submission went, on clause 4.3 of the letter of offer as seen in exh. "CSF5" of encl. 19 and that clause stipulates that (the relevant parts only):

*d**e**f*

If there is no OD/TR facility all past due sums on BA shall be subject to an interest rate of 4% per annum above the Bank's BLR or such other rate as the Bank may impose from time to time.

Again, in compliance with the Bank Negara Malaysia's directive dated 15 September 1998, the plaintiff had accordingly reduced the interest rate for the banker's acceptance facility to 2.5% per annum above the plaintiff's BLR with effect from 1 October 1998. Again, this reduction can be seen in the amended statement of claim and in the judgment dated 24 June 1999 as reflected in exh. "SK1" of encl. 18.

*g**h*

I must say that the judgment sum and the BLR and that would be 8.5% per annum as at 31 October 1998 were correctly and accurately stated as at the date of 31 October 1998. The interest rate for the overdraft facility was levied on the basis of daily rests while the interest rate for the banker's acceptance

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- a* facility was levied on the basis of monthly rests. And in accordance with cl. 4.1(c) of the letter of offer as per exh. “CSF5” of encl. 19, it had been agreed that the rate of interest for the overdraft facility would be levied on the basis of daily rests. The relevant parts of cl. 4.1(c) of the letter of offer reads as follows:
- b* Interest on the OD facility will be payable on the available daily balance up to actual payment (as well after and before judgment) at the rate aforesaid. Such interest will accrue from day to day and be calculated on the basis of the actual number of days elapsed and a 365 day year.
- c* Taken cumulatively together all these facts would show that the judgment dated 24 June 1999 was obtained in a regular fashion. There was no ambiguity in the said judgment in regard to the principal sum and the interest that were levied for both the overdraft and the banker’s acceptance facilities which the second and the third defendants were obliged to pay the plaintiff. If there was
- d* any ambiguity at all (and there was none here), there was no request emanating from the second and the third defendants in order to ascertain the amount of interest payable under the said judgment. That being the case, the principle of law in regard to the default judgment which “included an element of contractual interest at a fluctuating rate” as enunciated in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd (supra)* would be inapplicable
- e* to the facts of the present case. With the greatest of respect, to say like what Edgar Joseph Junior FCJ had said in regard to the appellant in the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd (supra)* that “the appellant would still be perplexed as to the amount of interest he would have to pay, and so he would be perplexed as to the total sum he would have
- f* to pay under the default judgment in order to avoid enforcement proceedings” (see p. 42 of the report) and thereby rendering the default judgment there to be “an irregular judgment” (again see p. 42 of the report) was certainly inappropriate and uncalled for. Here, the judgment, as I said, was regularly obtained and there was nothing sinister about it. The second and the third
- g* defendants were not “perplexed” at all.

Conclusion

For the reasons as adumbrated above, the second and the third defendants’ appeal in encl. 24 should be dismissed with costs.

*h**i*